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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 513

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND OMAHA GRAIN EXCHANGE OF OMAHA, NEBRASKA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

T. T. RAILEY,
GEO. W. HOLMES,
TOLL P. WARE,
Counsel for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF MISSOURI,
EASTERN DIVISION

OCTOBER TERM, 1951

No.

Civil Action No. 7769. (1)

Filed December 6, 1951

GUY A. THOMPSON, TRUSTEE, MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiff, Guy A. Thompson, Trustee, Missouri Pacific Railroad Company, Debtor, submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States

has jurisdiction on appeal to review the final judgment and decree of the United States District Court entered herein on October 30, 1951. A petition for appeal is presented to the District Court herewith, to-wit, on December 6, 1951.

Statutes Conferring Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the final judgment and decree of the District Court entered in this case is conferred by Title 28, United States Code, sections 1253, 1336, 2101(b), 2284, and 2321-2325, inclusive, effective September 1, 1948, 62 Stat. 928, 931, 962, 968, 969-970.

Cases Sustaining Jurisdiction

Alabama Great Southern Railroad Company, et al. v. *United States of America, et al.*, 340 U.S. 216.

Interstate Commerce Commission v. *Mechling, et al.*, 330 U.S. 567.

Pennsylvania Railroad Company, et al. v. *United States of America, et al.*, 323 U.S. 588.

United States, et al., v. *Missouri Pacific Railroad Company*, 278 U.S. 269.

Atchison, Topeka & Santa Fe Railway Company, et al., v. *United States, et al.*, 279 U.S. 768.

Statutes Involved

This appeal involves the application of the following statutory provisions:

Section 15, paragraphs (3) and (4), Part I, Interstate Commerce Act, 54 Stat. L. 911 (49 U.S.C. Sec. 15), which read as follows:

"(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public

interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification, or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or

more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine), establish temporarily such through routes as in its opinion are necessary or desirable in the public interest."

Other provisions of the Interstate Commerce Act incidentally involved are:

Section 1, Paragraph 4, Part I, Interstate Commerce Act, 54 Stat. L. 900 (49 U.S.C. Sec. 1(4)) which reads as follows:

"(4) It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their

operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3, Paragraph 4, Part I, Interstate Commerce Act, 54 Stat. L. 903, 904 (49 U.S.C. Sec. 3(4)) which reads as follows:

"(4) All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 6, Paragraph 1, Part I, Interstate Commerce Act, 34 Stat. L. 586, 41 Stat. L. 483, 49 Stat. L. 543 (49 U.S.C. Sec. 6(1)), which reads as follows:

"(1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately estab-

lished rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part."

Nature of the Case and the Ruling of the District Court

This is an action by plaintiff, who is a common carrier by railroad, to set aside, annul, suspend, and enjoin an order of the Interstate Commerce Commission entered July 10, 1950, and affirmed January 8, 1951, in the proceeding entitled *Omaha Grain Exchange of Omaha, Nebraska*, v. *Missouri Pacific Railroad Company (Guy A. Thompson, Trustee), and Chicago, Burlington & Quincy Railroad Company*, No. 29461 on the Commission's docket and which is reported in 278 I.C.C. 519.

The Commission's report of July 10, 1950, was by a divided vote, three members dissented and one was absent. The Commission's order of January 8, 1951, denied the Missouri Pacific's petition and the petitions of several interveners for reconsideration and had the effect of affirming the

Commission's report and order of July 10, 1950. The Commission's order of January 8, 1951, was also by a divided vote. Four members voted to grant the petitions for reconsideration.

Docket No. 29461 was instituted by the Commission upon complaint of the Omaha Grain Exchange of Omaha, Nebraska, an intervener in this proceeding, and in which complaint it is alleged and contended:

(a) That the rates on grain and grain products, in carloads, from points on the Missouri Pacific in Kansas (Concordia and west) to Omaha, Neb. (which includes Council Bluffs, Iowa), were unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and subjected complainant to undue prejudice and disadvantage in violation of Section 3 of the Interstate Commerce Act;

(b) That the lines of the Missouri Pacific to Concordia thence Burlington beyond to Omaha afforded a practicable through route as provided in Section 15 of the Interstate Commerce Act.

The case was duly heard by a Commission Examiner at Omaha, Neb., on April 17 and 18, 1946. It is and has been the position of the Missouri Pacific (plaintiff before the Court, but a defendant before the Commission) that it has a single-line route from each and all of the Kansas origins involved to Omaha, Neb.; that it is the originating carrier of all grain and grain products shipped by rail from those origins; and, is entitled to haul any of said grain shipped from those origins to Omaha, Neb., over its single-line route, thereby giving it its long haul.

The Examiner in his proposed report recommended to the Commission that it should find that the rates assailed were not shown to be unreasonable or otherwise unlawful, that the evidence would not sustain the prescription of the

through route and joint rates sought, and that the complaint should be dismissed.

Exceptions and replies to exceptions were filed to the Examiner's proposed report and, finally, on August 31, 1948, Division 2 entered its report which differed from the recommendations contained in the Examiner's proposed report. Division 2 concluded its report by stating:

> "The provisions of section 15 (3) and (4) of the Act are invoked by defendants as preventing us from according the relief sought by complainant in that the Missouri Pacific would thereby be short-hauled. The joint routes via Concordia are the short routes over which combination rates presently apply. The provisions relied upon do not preclude us from determining and prescribing reasonable rates over that route. *Virginian Ry.* v. *United States*, 272 U. S. 658, 666. Establishment of such rates over the single-line route of the Missouri Pacific apparently would satisfy the complaint and we see no reason why that defendant should not be afforded an opportunity to do so."

and finding:

> ". . . that the rates assailed from points on the Central Branch of the Missouri Pacific to Omaha and Council Bluffs are and for the future will be unreasonable to the extent that they exceed or may exceed rates on like traffic from the same origins to Kansas City."

Division 2 did not enter an order. It stated:

> "Entry of an order will be deferred to afford the Missouri Pacific an opportunity to establish the rates herein found to be reasonable. If such rates are not established within a reasonable time complainant may petition for entry of an appropriate order."

The Missouri Pacific refused to voluntarily establish the rates found reasonable by Division 2 over its single-line

route from the Kansas origins to Omaha because it would have been necessary for it to depart from an outstanding order of the Interstate Commerce Commission in *Grain and Grain Products*, 205 I. C. C. 301; 215 I. C. C. 83, and that an order based on said findings by Division 2 would violate Section 15(4) of the Interstate Commerce Act, which section protects the carriers from short-hauling.

Petitions for reconsideration of the report by Division 2 were filed by the Missouri Pacific and the various interveners and, finally, the Commission, by a divided vote, three members dissenting and one member being absent, entered its report of July 10, 1950, reported in 278 I. C. C. 519, in which it considered the contention of the Missouri Pacific that Section 15(3) and (4) of the Act prevents it from according the relief sought by complainant and concluded, as did Division 2, that since through routes are already in existence at combination rates over the short routes through Concordia by way of the Missouri Pacific and Burlington, and the only relief sought by complainant being reasonable rates over those routes, it was unnecessary to discuss the provisions of Section 15(3) and (4) and that those provisions of the Act were no bar to the prescription of reasonable rates over such routes, citing *Virginian Ry.* v. *United States*, 272 U. S. 658. Whereupon, it found that the rates assailed from points on the Central Branch of the Missouri Pacific to Omaha and Council Bluffs are and for the future will be unreasonable to the extent they exceed, or may exceed, rates on like traffic from the same origins to Kansas City.

Concurrently therewith, the Commission entered its order of July 10, 1950, requiring the defendants (Missouri Pacific and Burlington), according as they participate in the transportation, to establish and to maintain and apply to the transportation, in carloads, of grain and grain products,

from points in Kansas described in the complaint to Omaha, Neb., and Council Bluffs, Iowa, via Concordia, rates which shall not exceed rates on like traffic from the same origins to Kansas City, Mo.

Petitions for reconsideration by the Commission of its report and order of July 10, 1950, were duly filed by the Missouri Pacific and certain interveners. Finally, on January 8, 1951, those petitions were denied by a divided vote of the Commission, four members voting to grant the petitions.

The effective date of the Commission's order has been postponed from time to time and is now scheduled to become effective on January 19, 1952, upon thirty days' notice.

Believing that there is no evidence of record to support the Commission's finding that a through route exists from the Kansas origins to Omaha, Neb., by way of the Missouri Pacific and Burlington through Concordia, and absent said through route via Concordia, the Commission was without power to prescribe through rates (joint, or locals which may be used in combination) over those two lines from the Kansas origins to Omaha which would have the effect of short-hauling the Missouri Pacific in violation of Section 15(4) of the Interstate Commerce Act. Plaintiff (Missouri Pacific), therefore, filed its complaint to set aside and enjoin the Commission's order. It was duly heard by a District Court of three judges as provided by law. On October 30, 1951, the Court, with one member dissenting, entered an opinion and a final judgment and decree dismissing the plaintiff's complaint. The majority of the Court concluded that:

> ". . . evidence of physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence

of a through route and its order for reasonable rates over that route."

A copy of the majority opinion and a copy of the dissenting opinion, which have not yet been reported, are appended hereto.

The Questions Involved Are Substantial

The report and order of the Commission entered on July 10, 1950, and which order the Missouri Pacific (plaintiff) seeks to have set aside, virtually removes the last vestige of right which the carriers have in preserving their long haul on traffic, even that which they originate, and protecting themselves from short-hauling.

The complaint filed with the Commission by the Omaha Grain Exchange of Omaha, Nebraska, can only properly be considered as a complaint which, *first*, invoked the power of the Commission under Section 15(3) and (4) of the Interstate Commerce Act to require the establishment of a through route from said Kansas origins to Omaha, Neb., over the lines of the Missouri Pacific and Burlington through Concordia; and, *second*, sought the prescription of reasonable rates over said route. The majority of the Commission has construed the complaint, however, to be strictly a rate case and not a route case on the theory that a through route already exists from the Kansas origins involved to Omaha, Neb., by way of the Missouri Pacific and Burlington through Concordia, Kan. In other words, if the Commission's order stands, it will open the way for it to remove by interpretation and by unsupported findings any limitations upon its power with respect to the establishment of through routes. It would have the effect of completely negativing any rights which the carriers have under Section 15(4) of the Interstate Commerce Act. It would subordinate the provisions of Section 15(4) to

other sections of the Act, particularly Sections 1(4), 3(4) and 6(1), whereas the Commission and the Courts have construed those sections of the Act to be of equal importance.

This appeal, therefore, presents several questions of substantial importance to the rail carriers and shippers alike. The Interstate Commerce Commission has prescribed in its general grain rate investigation, Docket 17,000, Part 7, which applies to the Western District, a comprehensive grain rate adjustment which has been in effect since 1935, subject only to the Ex-Parte general increases all of which have been approved by the Commission. The rates from these Kansas origins to the grain markets are a part of that general investigation. The pattern of that adjustment has the effect of channeling the flow of grain into the various Missouri River markets of which Kansas City and Omaha are important markets. If the Kansas City market has in any way been preferred over the Omaha market on grain from these Kansas origins, it is of the Commission's making and not the action of any individual carrier in trying to control the flow of grain to any particular market or telling the shippers on its line to which markets they can ship. In carrying out what they believed to be the intent of the Commission in prescribing that adjustment, the carriers did not establish through routes via all interior junctions with other lines to all the markets. And, apparently what they did in establishing rates and routes from these Kansas origins to the markets was satisfactory because the prescribed adjustment has been in effect over certain routes since July 1, 1935, without complaint from anyone until this complaint was filed by the Omaha Grain Exchange.

The Missouri Pacific has its single-line route from each and all of the Kansas origins involved direct to Omaha, Neb. It maintains over that route rates which were pre-

scribed and ordered to be maintained by the Interstate Commerce Commission.

Accordingly, the questions presented by this appeal are as follows:

1. Is a physical track connection between two lines sufficient in and of itself to establish the existence of a through route over those lines?

2. Does a carrier lose its rights under Section 15(4) of the Interstate Commerce Act by reason of having complied with the provisions of Section 1(4) of the same Act which require it to establish reasonable through routes with other such carriers and just and reasonable rates applicable thereto?

3. Does a carrier lose its rights under Section 15(4) of the Interstate Commerce Act by reason of it having complied with Section 3(4) of the Act which requires it to afford all reasonable, proper and equal facilities for the interchange of traffic between its line and a connecting line?

4. Does a carrier lose its rights under Section 15(4) of the Act by having complied with Section 6(1) of the Act which requires it to file with the Commission and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation between points on its own line?

In the majority Court opinion it is stated:

> "We conclude—evidence of physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route."

The facts as stated by the Court do not establish the existence of a through route from the Kansas origins involved

to Omaha by way of the Missouri Pacific and Burlington through Concordia because each fact as stated by the majority Court opinion existed by reason of those lines' compliance with their duty under Sections 1(4), 3(4) and 6(1) of the Interstate Commerce Act. And we do not believe it was the intention of Congress to establish a rule that a carrier's compliance with its duty under Sections 1(4), 3(4) and 6(1) of the Interstate Commerce Act should cause it to lose a right given it under Section 15(4) of the same Act.

Appellant admits there is a physical track connection at Concordia, Kan., between the Missouri Pacific and Burlington, but it submits that that fact in and of itself is not sufficient to establish a through route over those lines from the Kansas origins involved to Omaha, Neb.

The Interstate Commerce Commission in *Western Pacific Railroad Company* v. *North Western Pacific Railroad Company* (1933), 191 I. C. C. 127, 130 and 131, stated:

> "Connecting routes do not necessarily constitute through routes over which carriers may be forced to establish joint rates. The rights of connecting carriers afforded by the Act must be safeguarded, and in addition the necessity and desirability for the establishment of such through routes must be in the public interest."

and, just prior to that statement by the Commission and on page 130, the Commission also said:

> "Should complainant's theory be followed to its logical conclusion, through routes exist between all points throughout the country over all railroads wherever physical rail connections are available, even though some of the carriers may be entitled to refuse to join in such through route by the short-haul provision of Section 15(4)."

The Commission there very definitely held, and rightly so, that something more than physical track connections between two lines is necessary in order to establish a through route over those two lines.

In *Beaman Elevator Company v. Chicago & N. W. Ry. Co.* (1929), 155 I. C. C. 313, the Commission held that physical track connections plus the movement of one car of grain over said route under a through billing made out by the agent of one of the carriers participating in the movement was not sufficient to establish that route as an open through route, because, as the Commission found in its second report on reconsideration, that through billing was made out in error.

In addition to the above Commission authority, counsel for the government admitted in oral argument that physical track connections alone are not sufficient to establish a through route. But, notwithstanding that admission, the majority Court opinion states: "Physical connection of the tracks alone does not *necessarily* mean a through route exists." (Emphasis supplied.) That statement in the majority Court opinion is not a positive declaration of the law and to that extent has a weakening influence upon the rights preserved to the carriers under Section 15(4) of the Interstate Commerce Act.

The carriers under Section 1(4) of the Interstate Commerce Act are required to establish reasonable through routes with other carriers and just and reasonable rates. The fact that there might be through routes from the Kansas origins on the Missouri Pacific to destinations on the Burlington short of Omaha through Concordia does not prove or aid in proof of the existence of a through route from the Kansas origins to Omaha. The Missouri Pacific has its single-line route from each and all of the Kansas origins involved to Omaha.

There are, obviously, points on the Burlington between Concordia and Omaha which cannot be served by Missouri Pacific's single-line route. Consequently, under Section 1(4) of the Act, Missouri Pacific was under a duty to establish reasonable through routes upon request therefor from the origin points to Concordia on its line, and from Concordia to points short of Omaha on the Burlington.

Insofar as the duty of the Missouri Pacific to establish a through route with the Burlington from the points of origin to Omaha is concerned, it must not be overlooked that the Missouri Pacific can and does provide transportation between these points over its own single-line route. Section 15(3) of the Act provides that the Commission may establish through routes necessary or desirable in the public interest. Section 15(4) makes an exception to the extent that the Commission may not, in establishing a through route, require a carrier to short-haul itself, unless the carrier's long-haul route is found to be unreasonably long, or unless the proposed through route is necessary to provide adequate and more efficient transportation; and that subject to these limitations and so far as consistent with the public interest, the Commission shall give reasonable preference to the carrier which originates the traffic. Within the limitations of Section 15(4), railroads are entitled to decline to establish through routes which will short-haul them. Missouri Pacific was under no duty to establish a through route from these Kansas origins to Omaha by way of the Burlington through Concordia, until the additional requirements of Section 15(4) were made.

Counsel for the Commission argued that the establishment of joint class rates to points short of Omaha on the Concordia route is evidence of a through route to Omaha, as "through routes to certain points may be indicated by the presence of through routes to other points on the same line,

although the carrier may not have intended such results." *Through Routes and Through Rates*, 12 I. C. C. 163, 168. As pointed out in the Court's dissenting opinion, the Commission's statement in *Through Routes and Through Rates, supra*, that "through routes to certain points may be indicated by the presence of through routes to other points on the same line" relied on an earlier case, *Violations of the Act to Regulate Commerce*, 8 I. C. C. 290, 301. The dissenting member of the Court stated that an "Examination of the latter case reveals that it does not support the quoted statement." The Commission in that case had before it a situation where the railroad had established joint rates from one point, Springfield (southwest of St. Louis), on its line to Chicago, but had refused to establish through rates to Chicago from intermediate points between Springfield and St. Louis. From these intermediate points, closer to Chicago than Springfield, it actually cost more to ship to Chicago than it did to ship from Springfield. The Commission held that this practice was unlawful, relying on the ruling of the Supreme Court in *Cincinnati, N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 184, which was based on Section 4 of the Act.

Section 4 prohibits carriers from charging more "for a shorter than for a longer distance over the same line or route in the same direction, *the shorter being included within the longer distance.*" (Emphasis supplied.) The purpose of this section is to forbid "any undue or unreasonable preference or advantage in favor of any person . . . or locality." *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U. S. 197, 219-220. The prohibitions of Section 4 should not be distorted into a rule of law which would imply a through route over an entire line, where there is a through route over only a part of that line.

The proper and more reasonable view of that aspect of the case may be had from the following excerpts of more recent Commission and court cases.

The Commission has in *Lemon Cove-Woodlake Asso.* v. *A. T. & S. F. Ry. Co.* (1928), 139 I. C. C. 239, 245, stated:

> "the general provisions of Section 1(4); that carriers shall establish through routes and reasonable rates applicable thereto, are subordinate to the specific provisions of Section 15 for establishment of through routes and joint rates."

This Court, in *United States* v. *Mo. Pac. R. Co.*, 278 U. S. 269, 276, 277, stated:

> "The Act does not give the Commission authority to establish all the through routes it may deem necessary or desirable in the public interest. The general language of paragraph (3) is limited by paragraph (4)."

The Court there had reference to Section 15 of the Interstate Commerce Act, and it goes on to state in referring to Section 15(4) that:

> "The latter lays down the rule that, subject to specified exceptions, a carrier may not be compelled to participate in a through route which does not include substantially its entire line lying between the termini of the route. The purpose is to protect the long-haul routes of carriers."

Under Section 3(4) of the Interstate Commerce Act the carriers are required to afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares and charges between connecting lines, or unduly prejudice any connecting line in the distribution of

traffic that is not specifically routed by the shipper. The Missouri Pacific and Burlington have complied with the provisions of that section of the Act by establishing interchange facilities between their lines at Concordia, Kan., thereby affording through routes from the Kansas origins involved to destinations on the Burlington short of Omaha, Neb. Compliance with that provision of the Act, however, does not cause the Missouri Pacific to lose any rights which it has under Section 15(4) of the Act in preserving its long-haul on traffic which it is in a position to haul over its single-line route from these Kansas origins to Omaha, Neb.

Section 6(1) of the Interstate Commerce Act requires every common carrier, subject to Part I of the Act, to file with the Commission and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, . . . *when a through route and joint rate have been established.* It will be observed from a reading of Section 6(1), as heretofore set out in full, that the Missouri Pacific and Burlington are each under a separate duty to file, print and keep open to public inspection all rates and charges for transportation between different points on their respective lines. In the absence of a through route over those lines, neither the Missouri Pacific nor the Burlington is under any duty to publish rates from a point on its line to a destination on the other line. Neither has the Commission the power to prescribe a through rate over those lines in the absence of a through route. In other words, the Missouri Pacific and Burlington by complying with the provisions of Section 6(1) do not lose any rights granted to them under Section 15(4) of the Interstate Commerce Act. Stated in another way, the fact that the Missouri Pacific is required by Section 6 of the Act

to publish local rates between these Kansas origins and Concordia, Kan., and the Burlington Railroad is required to publish and maintain local rates between Concordia and all points on its line, including Omaha, is no evidence of the existence of a through route over those two lines between these Kansas origins and Omaha, Neb., because they are under a duty as required by Section 6(1) to publish local rates between all points on their respective lines. Neither could the Commission require each of them to reduce their local factors so as to compose a more reasonable through rate *in the absence of a through route over those two lines* from these Kansas origins to Omaha, Neb.

The majority Court opinion states that there is no basis in the record to support the Missouri Pacific's argument that the Commission's order will compel it to short-haul itself as it is not now carrying any grain from the origin points in Kansas to Omaha because of its prohibitive rates. The fact that no grain moves from the Kansas origins to Omaha over the Missouri Pacific and Burlington through Concordia proves that the only means which it has of telling the shipping public that those two lines do not afford an open through route to Omaha is effective. The purpose of maintaining high local rates over those lines is to keep those lines closed to through grain traffic moving from the Kansas origins to Omaha and to preserve to the Missouri Pacific its single-line haul on all grain moving from these Kansas origins to Omaha.

The rates applied on grain by the Missouri Pacific over its single-line route are Commission prescribed and have been in effect since July 1, 1935, without change except for the Ex Parte general increases which have been approved by the Commission. The only issue presented by this appeal is whether or not a through route exists on grain and grain products from the Kansas origins to Omaha, Neb., by way

of the Missouri Pacific and Burlington through Concordia. If a through route exists, the Commission has the power to prescribe a through rate. If a through route does not exist; the Commission has no power to prescribe a through rate, either joint or local, which could be used in combination.

Appellant submits that there is no evidence of record to establish the existence of a through route and, therefore, the Commission did not have the power to prescribe a through rate. Its order is, therefore, unlawful and should be set aside and enjoined.

It is believed, therefore, that the questions presented by this appeal are substantial and that they are of vital public importance.

Respectfully submitted,

T. T. Railey,
Geo. W. Holmes,
Toll R. Ware,
Attorneys for Plaintiff-Appellant.

Date: December 6, 1951.

APPENDIX "A"

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 7769(1)

GUY A. THOMPSON, Trustee, Missouri Pacific Railroad Company, Debtor, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*

APPEARANCES:

For Plaintiff: Messrs. T. T. Railey, George W. Holmes and Toll R. Ware, of St. Louis, Mo.

For Defendant: William J. Hickey, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

For Intervening Defendant, Interstate Commerce Commission: Daniel W. Knowlton, Chief Counsel, and Samuel R. Howell, Assistant Chief Counsel, Interstate Commerce Commission, Washington, D. C.

For Intervenor, Omaha Grain Exchange of Omaha, Nebraska: Oscar J. Moberg of St. Louis, Mo.

Before Sanborn, Circuit Judge, Moore and Hulen, District Judges

OPINION

HULEN, Judge:

This is an action (28 U.S.C.A. §2325) brought by the Trustee of the Missouri Pacific Railroad Company to enjoin execution of an order of the Interstate Commerce Commission entered on July 10, 1950, requiring the carrier to establish reasonable rates for the transportation of grain and grain products, shipped from points on its line in central Kansas to Omaha, Nebraska, and Council Bluffs, Iowa, over routes maintained between such points by the plaintiff (hereinafter referred to as Missouri Pacific) in connection

with the Chicago, Burlington & Quincy Railroad (hereinafter referred to as Burlington), which rates were, by the Commission's order, not to exceed rates maintained by the carriers between similar origin points and Kansas City, Missouri.

This cause was initiated before the Interstate Commerce Commission, on complaint filed by the Omaha Grain Exchange of Omaha, Nebraska, against the Missouri Pacific and the Burlington charging violation of Sections 1 and 3 of the Interstate Commerce Act. Section 3 of the complaint filed before the Commission contains the following paragraph:

> "That the defendants herein publish rates and maintain for transportation of grain and grain products to the market of Omaha, Nebraska (which includes Council Bluffs, Iowa) rates and charges that are unjust and unreasonable in violation of Section I of the Interstate Commerce Act from points in Kansas located on the Missouri Pacific Railroad from Concordia, Kansas, and west thereof, known as the Central Branch, operating due west from Atchison, Kansas, and subjecting complainant to undue prejudice and disadvantage in violation of Section II of the Interstate Commerce Act."

The prayer of the complaint sought the Commission's order as to each carrier "to cease and desist from the aforesaid violations of said Act and establish and put in force and apply in future from the territory named in paragraph 3 hereof to the market of Omaha such other rates as the Commission may deem reasonable and just * * *".

The complaint before the Commission sought no relief under Section 15 of the Act. The Commission granted no relief under Section 15 of the Act. The proceedings here for review are a complaint charging violation of Sections 1 and 3 of the Act and an order of the Commission conforming to the complaint. Consideration of right of the Commission to establish a through route under Section 15 of the Interstate Commerce Act is foreign to the record of the Commission presented here for review.

The Missouri Pacific operates a single line route westward from Atchison, Kansas (a point on its main north and south line between Omaha and Kansas City), through Concordia to Lenora, points which are 155 and 293 miles, respectively, west of Atchison. The territories of Concordia and Lenora are representative origin points for the shipment of grain to points such as Kansas City, Atchison, and Omaha, commonly referred to as the primary markets, from which points grain or products manufactured therefrom are reshipped to points east. In the processing of grain a differential of a cent in freight rates will adversely affect a market. A rate of 19 cents per hundred pounds is charged for a shipment of grain from Lenora to Kansas City. This shipment would move over the Missouri Pacific's line through Concordia to Atchison and then southward over its main line to Kansas City. The distance is 341 miles. For a shipment from Lenora to Omaha, through Concordia to Atchison, then northward to Omaha, the Missouri Pacific has a rate of 25.5 cents. The mileage is 449.5 miles. The Burlington operates a route into Concordia, and publishes a rate of 16 cents for a shipment from that point to Omaha, a distance of 187 miles. A shipment from Lenora to Omaha, moving to Concordia, thence over the Burlington's lines into Omaha, would travel 336 miles, or 5 miles less than the distance from Lenora to Kansas City, but the combination of rates applicable for such a through shipment is 30 cents, as compared to the 19 cent rate to Kansas City.

The Commission found:

> "As through routes are already in existence the combination rates over the short routes through Concordia by way of the Missouri Pacific and the Burlington, and the only relief here sought by complainant being reasonable rates over those routes, division 2 correctly concluded that it was unnecessary to discuss the provisions of section 15(3) and (4), and that those provisions of the act were no bar to the prescription of reasonable rates over such routes."

The Missouri Pacific does not seriously dispute the unreasonableness of the rates which were in issue before the

Commission. Its petition for rehearing before the Commission states its reason for maintaining the rates complained of.

> "The route over which the rates are assailed is not a published tariff route; it is closed to all intents and purposes by reason of the fact that the rates applicable over said route are made a combination of locals on Concordia and are higher than the through rate over the single line route of the Missouri Pacific."

By this action the Missouri Pacific attacks the order of the Commission, claiming it creates a through route along the lines of the two carriers to Omaha, forcing Missouri Pacific to short haul itself, because it has its own local line which by a longer route connects the Kansas points with Omaha.

All parties to this proceeding, in oral argument and by brief, concede the sole question is whether there was a through route in existence over the two carriers' lines via the Concordia connection, from Kansas points on Missouri Pacific's lines, west of Concordia, to Omaha and Council Bluffs over the Burlington, at the time of the commencement of the proceedings before the Commission and the Commission's order.

If the finding of the Commission that a through route did exist is based on substantial evidence, its order should not be disturbed by this Court. There is a presumption in the absence of clear evidence to the contrary that the Commission has properly performed its official duties and this presumption supports its official acts. It is the province of the Commission and not the Court to pass upon the weight and credibility of the evidence. It is no concern of this Court whether the conclusions of the Commission were correct if there is substantial evidence to support them.*

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* Some of the testimony evidenced confusion as to what sections of the Act the proceedings were based on. But there is ample record showing the complaint assigned violation of Section 1 and 3 of the Act, testimony was offered on that issue and the carriers so understood the issue. See testimony of witnesses Kuhn (p. 15), Vauck (p. 101), Thomas (p. 175), Allison (pp. 115, 128), and letter (p. 218).

We quote the definition of a through route which the Courts uniformly recognize:

> "A through route is an arrangement, express or implied, between connecting railroads for continuous carriage from a point on the line of one to a destination on the line of another. A joint rate is not essential. The through rate may as well be a combination of locals or proportionals." (*Grain and Grain Products*, 129 I.C.C. 261, 264.)

We find no case holding that one of the requirements of a through route is that it must be with respect to all character of merchandise. It seems elemental that a through route for merchandise carriage is the vital element in the arrangement. That the carrier by its own act, in fixing rates on certain commodities, may have restricted use of the route to particular commodities does not destroy the conclusion that it is a through route under the definition. Where a route is open and available and adequate to meet the needs of the public there is no occasion for the Commission to prescribe another route.

The first requisite to a through route is a physical connection between the tracks of the connecting carriers. This physical feature is present in this case. Physical connection of the tracks alone does not necessarily mean a through route exists. The official railway equipment Register compiled by the various railroads is on file with the Commission. It shows that the two carriers involved in this case, as well as other carriers, each list Concordia as a point of interchange of traffic with other lines, thus holding out to the public the existence of facilities for operation and existence of a through route.

Each of the carriers has combination rates over its part of the line involved. Missouri Pacific admits a shipment of grain could be made at a tariff composed of a combination of the local rates. The combination rate is so high it commercially closes the route on grain products. The fact that no grain has ever been shipped over the route at the combination rate is not conclusive that the route does not exist.

L. E. Kipp, General Traffic Agent for various lines operating in the area involved in this case, including the Missouri Pacific, has published on behalf of the carriers class rates for the shipment of specific commodities between points of origin in the area, on the line of the Missouri Pacific, and destination area, on the line of the Burlington, to stations short of Omaha, and over the route which the Commission found to be a through route. The parties conceded that these published rates are subject to judicial notice by the Commission and this Court. During oral argument counsel for the Missouri Pacific was asked whether or not as a result of the class rates in the Kipp publication they would issue a through bill of lading for a shipment on Missouri Pacific's line to a point on the Burlington. The answer was—"We might do that, but not Omaha". Counsel was further asked the question—"would you admit that there is a through route over these two connecting routes to all points short of Omaha?" The answer—"There might possibly be to some of them, but it would be short of Omaha".

Missouri Pacific now takes the position that although a through route existed for some commodities this fact did not warrant the finding that the route existed for grain and grain products. It cites in support of its position the case of *Stickell* vs. *Alton Railroad Company*, 255 I.C.C. 333, and *California Milling Company* vs. *A. T. & S. Fe R. Co.*, 276 I.C.C. 531. We are unable to agree with appellant that these authorities support its position.

The Commission cited the case of *Virginian Railway Company vs. United States*, 272 U. S. 658, as authority for its conclusion of the existence of a through route. The facts in that case disclose a striking analogy to the present case. The Virginian line connected to 109 coal mines in West Virginia, all of which received service at reasonable rates to eastern points on the Atlantic Coast. The controversy arose in regard to shipments westward from these various mines. Combination rates had been published by the Virginian and Chesapeake & Ohio Railroads, which had a physical track connection west of these 109 mines. However, the combination rates were so high that

the westward routes were commercially closed. (This was done purposely, because the Virginian wanted to divert all of the traffic eastward, wholly on its own line. The Commission in the instant case found that Missouri Pacific wanted to divert grain to Kansas City.) Subsequently the Virginian entered into an agreement with the Chesapeake & Ohio for reciprocal switching, whereby 45 of the 109 mines on the Virginian line would enjoy through routes at reasonable rates to the west. It was the other 64 mines which brought the complaint before the Commission, claiming that they also should enjoy reasonable through rates to the west. These were the only two factors before the Commission to indicate the existence of a through route, namely the combination rates, excessively high, plus the through route privileges already enjoyed by some of the mines on the Virginian line. The Supreme Court held—"Through routes to the west were already in existence. And there were through rates by combination." (l.c. 666) The orders of the Commission in the *Virginian* case and the instant cases are similar. In neither case was a joint rate prescribed. The Commission found that the existing combination rate was unreasonable and discriminatory, and ordered it to be not higher than a specific amount. For such a finding and order, it is unnecessary that there be a finding of public interest as required under Section 15(3). (See footnote 1, l.c. 667.)

We conclude—evidence of physical interchange connection at Concordia, plus long established joint rates to some points on the Burlington short of Omaha, plus combination rates to Omaha, furnish sufficient evidentiary basis for the conclusion of the Commission of the existence of a through route and its order for reasonable rates over that route.

The argument of the Missouri Pacific that the Commission's order will compel it to short-haul itself can find no basis in the record. It is not now carrying any grain from the origin points in Kansas to Omaha because of its prohibitive rates. The present rate over appellant's line does not protect "its long-haul on this traffic"

to Omaha. It follows the Commission's order does not direct appellant to "short-haul itself" on any freight now being carried to Omaha by the Missouri Pacific. The Supreme Court has declared there is no basis for the concept that restrictions on the power of the Commission to establish through routes, found in Section 15 of the Act, should also be applied to limit the power of the Commission to establish reasonable rates. *A. T. & S. F. Ry.* vs. *United States,* 279 U. S. 768, l.c. 776.

Execution of the Commission's order may result in some loss of revenues by diverting grain shipments from Kansas City to Omaha but this probable result creates no right in the abstract for the Missouri Pacific to tell shippers where they shall consign their grain or control the grain markets. Regulations of the Interstate Commerce Commission are not alone for the benefit of the carriers; the public has an interest as well. It is for the Commission to balance and determine how these interests shall be preserved. *Stickell* vs. *Alton Railroad Company, supra,* l.c. 337, as follows:

> "It is not the province of railroads to determine what markets shall be available to sellers or buyers, or by * * * the maintenance of rate disadvantages to restrict or circumscribe the opportunities of shippers located on other railroads to sell in markets served by them. It is their function to transport in the channels necessitated by trade conditions and not to fix limitations on commerce. The public interest demands that all shippers be accorded relatively equal opportunities to reach all reasonably available markets."

Injunction denied and plaintiff's complaint dismissed.

(S.) JOHN B. SANBORN,
(S.) RUBEY M. HULEN.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

No. 7769(1)

GUY A. THOMPSON, Trustee, MISSOURI PACIFIC RAILROAD COMPANY, Debtor, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*

Before SANBORN, Circuit Judge, MOORE and HULEN, District Judges

OPINION

MOORE, *Judge*:

I am unable to agree with the opinion of the Court. I would hold the order invalid, and enjoin its enforcement.

The Missouri Pacific has its own route between the representative origin points to Omaha, which route passes through Concordia. It desires, of course, to handle shipments between these points on its own line, on which the rate for grain is 25½ cents, which rate has not been attacked and is presumably reasonable. That rate, however, is 6½ cents higher than the rate from the representative origins to Kansas City, the Kansas City route being over a hundred miles shorter than the Missouri Pacific route to Omaha. The result, of course, is that Omaha cannot compete with Kansas City.

The Burlington connects Omaha and Concordia, and intervening points. From the representative origin points to points on the Burlington between Omaha and Concordia there are published joint class rates for certain commodities. The joint class rates cease short of Omaha, and the rate to Omaha via the Burlington (hereinafter called the Concordia route) is a combination rate of 30 cents, the combination rate being made up for the sum of the local rates of 16 cents and 14 cents.

Missouri Pacific admits that the combination rate over the Concordia route is so high as to be prohibitive, but it

states that "the publication of those local rates the combination of which is higher than the through rate over the Missouri Pacific direct, was the only effective means the Missouri Pacific had of telling the shipping public that through grain traffic from * * * [the points of origin] * * * would not be handled over these lines." Missouri Pacific also argues that the Commission's order will require it to shorthaul itself in violation of Section 15(4) of the Act.

There are, obviously, points on the Burlington between Concordia and Omaha which cannot be served by the Missouri Pacific Missouri River route. Consequently, under Section 1(4) of the Act, Missouri Pacific was under a duty to establish reasonable through routes upon request therefor from the origin points to Concordia on its line, and from Concordia to points short of Omaha on the Burlington. The Missouri Pacific has apparently complied with this duty, as counsel for the Commission state that such through routes exist.

Insofar as the duty to establish a through route via the Burlington from the points of origin to Omaha is concerned, it should be noted that the Missouri Pacific can and does provide transportation between these points over its own route. Section 15(3) of the Act provides that the Commission may establish through routes necessary or desirable in the public interest. Section 15(4) makes an exception to the extent that the Commission may not, in establishing a through route, require a carrier to shorthaul itself, unless the carrier's long-haul route is found to be unreasonably long, or unless the proposed through route is necessary to provide adequate and more efficient transportation; and that subject to these limitations and so far as consistent with the public interest, the Commission shall give reasonable preference to the carrier which originates the traffic. Within the limitations of Section 15(4), railroads are entitled to decline to establish through routes which will short-haul them. Missouri Pacific was under no duty to establish a through route to Omaha via Burlington, until the additional requirements of Section 15(4) were met. The position of the Missouri Pacific is that the requirements

which must be met before the Commission can establish a through route under Section 15(4) do not now exist.

The only issue presented by this appeal is whether the Commission had the authority to prescribe the through combination rate over the Concordia route. The Commission found that a through route existed, and it is argued that if a through route did exist, then the Commission had authority to prescribe the through combination rate. The issue then is whether the evidence supports the Commission's finding of an existing through route.

The facts on which the Commission has relied to support this finding are the following: (1) physical connection of the Missouri Pacific and Burlington tracks at Concordia; (2) the listing of Concordia in the official railway equipment register as a point of interchange with other lines; (3) the establishment of through rates to points short of Omaha on specific commodities; and (4) the evidence of a combination rate over the route in question.

Counsel for the Government admitted in oral argument that the fact of physical connection alone was not sufficient to establish a through route. The Commission argues that the establishment of joint class rates to points short of Omaha on the Concordia route is evidence of a through route to Omaha, as "through routes to certain points may be indicated by the presence of through routes to other points on the same line, although the carrier may not have intended such results". *Through Routes and Through Rates*, 12 ICC 163, 168.

As pointed out above, the Missouri Pacific was under a duty to establish reasonable through routes upon request to points short of Omaha under Section 1(4) of the Act, and if such routes had not been established, the Commission could have ordered them if they were found to be in the public interest under Section 15(3). Yet Missouri Pacific was under no duty to establish a through route to Omaha on the Concordia route merely because that route would be reasonable and desirable in the public interest. The policy of the Act permits the carrier additional protection where, as here, such a through route will force it to shorthaul itself. Section 15(4). I do not believe that it

was the intention of Congress to establish a rule that a carrier's compliance with its duty under Section 1(4) of the Act should cause it to lose a right given it under Section 15(4).

Moreover, the Commission's statement in *Through Routes and Through Rates, supra*, that "through routes to certain points may be indicated by the presence of through routes to other points on the same line" relied on an earlier case, *Violations of the Act to Regulate Commerce*, 8 ICC 290, 301. Examination of the latter case reveals that it does not support the quoted statement. The Commission in that case had before it a situation where the railroad had established joint rates from one point, Springfield (Southwest of St. Louis), on its line to Chicago, but had refused to establish through rates to Chicago from intermediate points between Springfield and St. Louis. From these intermediate points, closer to Chicago than Springfield, it actually cost more to ship to Chicago than it did to ship from Springfield. The Commission held that this practice was unlawful, relying on the ruling of the Supreme Court in *Cincinnati, N.O. & T.P. Ry. Co.* v. *ICC*, 162 U.S. 184, which was based on Section 4 of the Act.

Section 4 prohibits carriers from charging more "for a shorter than for a longer distance over the same line or route in the same direction, *the shorter being included within the longer distance*" (Emphasis mine). The purpose of this section is to forbid "any undue or unreasonable preference or advantage in favor of any person * * * or locality". *Texas & Pacific Ry.* v. *ICC*, 162 U.S. 197, 219-220. The prohibitions of Section 4 should not be distorted into a rule of law which would imply a through route over an entire line, where there is no through route over only part of that line. On the contrary, the fact that the joint rates cease short of Omaha would logically give rise to an inference that the through route ceases at the same point—particularly where there has been no transportation beyond that point.

Nor do I think that the listing in the official register of Concordia as a point of interchange with other roads is any evidence to support the finding of a through route to

Omaha. Since traffic to points short of Omaha existed, it is difficult to see how Concordia could be listed otherwise.

The last fact relied on by the Commission in support of the finding of a through route, is the existence of the combination rate over the Concordia route. Under Section 6(1) of the Act, Missouri Pacific was under a duty to publish the rates to points short of Omaha on that route. But in the absence of the establishment of a through route all the way to Omaha, that section did not require it to publish the combination rate to Omaha. Missouri Pacific states that the publication of the combination rate to Omaha was necessary to inform the public that that route was commercially closed and that shipments to Omaha would be handled only on its own Missouri River line to Omaha.

The combination rate is the sum of the local rates and is so high as to be prohibitive, with the result that the route is commercially closed. It may, nevertheless, be a through rate, and a through rate presupposes a through route.

> "A through route is an arrangement, express or implied, between connecting railroads for continuous carriage from a point on the line of one to a destination on the line of another. A joint rate is not essential. The through rate may as well be a combination of locals or proportionals." *Grain and Grain Products*, 129 ICC, 261, 264.

There is no doubt that here there is a through rate, a combination of locals, although the route is commercially closed because the rate is prohibitive. The fact that a route is so closed has been held not to bar the Commission from prescribing reasonable and nondiscriminatory through (but not joint) rates under Sections 1 and 3 of the Act, without proceeding under Section 15(3). *Virginian Ry. Co.* v. *U.S.*, 658, 666-667.

The present case can be distinguished from the *Virginian* case. Though the Court said in the *Virginian* case that the through route was commercially closed, there was an open through route in existence from points on the Virginian on either side of the complainants' mines, the complainants'

mines "being entirely surrounded by mines taking the district rate which * * * [complainants] * * * seek". *Wyoming Coal Co. v. Virginia Ry. Co.*, 96 ICC 359, 361. The Commission there found that the plaintiff shippers were subjected to undue prejudice by this arrangement and that the rates were themselves unreasonable. The Concordia route in the present case is closed to everybody. And in the *Virginian* case, the short haul factor was not present, and only Section 15(3) was involved. The Virginian was merely attempting to build up a coal traffic in one direction. Section 15(4) permits carriers to avoid shorthauling themselves.

The definition of a through route states that it is an arrangement for continuous carriage between points on different lines. In actual practice, the arrangement here was one which prohibited continuous carriage to Omaha over the Concordia route. I think that such a technicality as a commercially closed route should not, in view of Section 15(4), be considered evidence of a through route.[1] I therefore conclude that the finding of an existing through route is not supported by the evidence and that the relief prayed for should be granted.

Nor do I agree with the argument that the Commission's order will not require the Missouri Pacific to short-haul itself, because there is no grain traffic to Omaha at this time on the Missouri Pacific's single line route. Clearly, the Concordia route embraces substantially less than the entire length of the Missouri Pacific's road which lies between the termini of that route. The language of Section 15(4) is clear and without ambiguity, and the Court is "not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction * * *. Construction may not be substituted for legislation". *United States* v. *Missouri Pacific Ry. Co.*, 278 U.S. 269, 277.

Plaintiff also cites decisions of the Interstate Commerce Commission which apparently hold that the Commission

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[1] Commisisoner Eastman, concurring on *Beaman Elevator Co.* v. *C. & N.W. Ry. Co.*, 155 I.C.C. 313, 315, after consideration of the *Virginian* case, stated that through routes "may, and frequently do, exist" where there are combination rates.

ought not to order lower combination rates, where combination rates already exist, even though it has the power to prescribe such rates, on the ground that to do so would be to require the carrier to short-haul itself in violation of Section 15(4).[2] In view of my decision that there is no evidence to support the Commission's finding of the existence of a through route, it is unnecessary to decide this question. A further point is made by plaintiff, to the effect that the order requires the establishment of joint rates. But it is clear that the order, if not otherwise invalid, could be complied with by establishing lower combination rates.

Dated this 30th day of October, 1951.

(Signed) Geo. H. Moore, United States District Judge.

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[2] *Western Pacific Ry. Co.* v. *Northwestern Pacific Ry. Co.*, 191 ICC 127; *Port of New York Authority* v. *A.T. & S.F. Ry. Co.*, 144 ICC 514, 517, 518; Commissioner Eastman's concurring opinion in *Beaman Elevator Co.* v. *C. & N.W. Ry. Co.*, 155 ICC 313, 315. See also *R.C. Williams & Co. Inc.* v. *N.Y.C. Ry. Co.*, 269 ICC 297, 300, and *Lourie Mfg. Co.* v. *C.N. R.R. Co.*, 42 ICC 448. In the latter case, cited in the *Virginian* case, for the proposition that there were through rates by combination, the Commission distinguished the case from another case in which combination rates over a commercially closed route were held not to create a through route.